IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 4396 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAVAN GOVIND GARVA - Appellant(s)
Versus
LAKHA SUMAR MAHESHWARI & 2 - Defendant(s)

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Appearance :
MR SURESH M SHAH for Appellant(s) : 1,
NOTICE SERVED for Defendant(s) : 1 - 2.
MR SANDIP C SHAH for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 24/01/2007

ORAL JUDGMENT

1. The original claimant has preferred this appeal to seek enhancement in compensation awarded by the Motor Accident Claims Tribunal (Aux.), Surendranagar in Motor Accident Claim Petition No. 487 of 1987 by judgment and award dated 9th July, 1996.

2. The appellant suffered bodily injuries in vehicular accident, which occurred on 11.05.1987. On that day, the appellant was discharging his duties as cleaner in a truck bearing Registration No. GTY 6302. According to him, respondent No.1 was the driver and the truck was owned by respondent No.2. It was insured with respondent No.3. It is stated that respondent No.1 drove the vehicle in full speed and in rash and negligent manner. As a result of the same, he dashed against a truck, which was already parked on the correct side of the road. Due to collision between two vehicles, the appellant received injuries and he was hospitalised. He remained in the hospital for a month or so. According to him, he had suffered serious injuries to his toes and other parts of the body. As a result of such injury, there was amputation of toes and also skin grafting was done. The appellant filed claim petition under the provisions of the Motor Vehicles Act for obtaining compensation of Rs.one lakh, which was resisted by respondent No.3- the Insurance Company. Whereas, respondent Nos. 1 and 2 chose not to contest the proceedings. The Insurance Company filed written statement at Exh.7. It was contended that there was no negligence on the part of respondent No.1. It was further averred that there was no insurance in favour of respondent No.2. In other words, there was no contract of insurance existing between respondent No.2 and respondent No.3. It was, therefore, prayed that respondent No.3 was not required to discharge the liability of respondent

No.1.

3. On the basis of the material produced before it, the Tribunal reached the conclusion that the accident occurred solely due to the negligence of respondent No.1. The Tribunal, thereafter, assessed compensation payable to the appellant at Rs.13,000/- and further held that only respondent Nos. 1 and 2 were required to satisfy the award. The Tribunal exonerated respondent No.3.

In the present appeal, the appellant has raised two fold challenge to the aforesaid findings. He has contended that the Tribunal has erred in not assessing the compensation properly and secondly, the Tribunal erred in exonerating the Insurance Company.

4. I have heard Mr. Mehul S. Shah learned advocate for the appellant. He has contended that there is no substantive appeal or cross-objection filed either by respondent No.1 or respondent No.2 and, therefore, the finding given by the Tribunal with regard to the negligence of respondent No.1 has become final. He has further submitted that the Tribunal committed error in not awarding just compensation. In his submission, considering the serious nature of the injuries suffered by the appellant and the resultant disability of permanent nature, the Tribunal ought to have awarded full amount. Lastly, he has contended that the appellant had made necessary averments in the main petition with regard to the insurance policy and he had also made efforts to get the policy produced, but failed. However, at the time when the Insurance Company took up the defence, it was its

duty to produce the policy on record or some substantive evidence to support its contentions.

Having considered the submission of Mr. Mehul S. Shah learned advocate and also considering the record and proceedings of the case, it appears that the Tribunal has committed certain obvious mistakes. The appellant has produced medical certificate, which is given mark 7/22, which is the certificate issued by Dr. V.C. Dave on 8.9.1989. He was discharging the duty as R.M.O., G.K. General Hospital, Bhuj-Kutch. In the certificate, it is categorically stated regarding amputation of 2nd, 3rd, 4th and 5th toe of the right leg on 14.5.1987. It also shows that the appellant had received crushing injuries on his right foot and injuries on left leg and right hand. However, the Tribunal has not assigned any proper reason for not admitting the certificate in evidence and giving it exhibit number. Nobody has challenged the certificate. It is also very strange that the appellant was himself present before the Tribunal and his physical condition was visible to the Presiding Officer of the Tribunal and there were photographs showing his physical condition also. There was no earthly reason to disbelieve the say of the appellant. The cause of the injuries and also the consequences of the injuries have been adequately spelt out in the above certificate. They are amply corroborated by the physical appearance of the appellant and the photographs produced by him. Therefore, there is no hesitation in my mind to hold that the injuries are direct cause of the accident in question. It was, therefore, absolutely

necessary for the Tribunal to admit the said document in evidence. The Division Bench of this Court in a decision rendered in the case of **United India Insurance Company Ltd. Vs. Chandansinh Thakor and others** reported in **2006(2) GLR 229**, has categorically relied upon that the strict rules of the Evidence Act are not applicable to such proceedings. It has held that even if oral evidence of physician has not been adduced, certificate issued by him cannot be brushed aside. This is more so when there is absolutely no challenge raised by the other side questioning the document, the Tribunal, therefore, ought to have admitted this document in evidence. It has failed to do so and, therefore, gross injustice has been caused to the appellant. However, at the oral request of Mr. Shah, the document is now taken in evidence and read, which is exhibited at Exh.17A. The certificate shows following five injuries :

1. Crushing injuries over right foot
2. Pain and tenderness over right leg
3. Multiple abressions over back
4. Pain and swelling over right hand
5. Abressions over both the leg.

And following internal injuries were detected :

1. Fracture Radius- Ulna right
2. Amputation of 2nd, 3rd, 4th, 5th toe of right leg was done on 14.5.1987
3. Fracture 3rd, 4th and 5th Meta tarsal right
4. Fracture Calcanium right.

This shows that the injuries suffered by the appellant were very serious in nature and the injuries required amputation of 2nd, 3rd, 4th and 5th toe of the right leg. As a result of the same, the appellant was unable to walk without help of crutches. He was totally rendered useless for performing the duties of cleaner. In the certificate, the doctor has opined that there is 100% functional disability over right lower limb. In view of the same, the Tribunal has committed gross error in awarding only Rs.2,000/- for pain, shock and suffering. So far as the head of pain, shock and suffering is concerned, considering the amputation and also the resultant effect thereof, and loss of amenities, the appellant deserves Rs.25,000/- under the head of pain, shock and suffering.

5. So far as the loss of actual as well as prospective income is concerned, evidence of Bhavanbhai Govindbhai - Exh.18 clearly shows that as a cleaner, he was receiving monthly salary of Rs.450/- and Rs.10/- per day as allowance. He has stated that he had to remain in hospital for about a month or so. It also appears from his evidence that after amputation, he was unable to work as cleaner. It may be noted here that at the time of deposition, his age was 24 years. Therefore, on the date of the accident, he could have been 16 years or 17 years. Therefore, there was ample scope for increase in the income with the passage of time. In view of the same, so far as actual loss of income is concerned, he could be awarded sum of Rs.750/-. But, so far as loss of prospective income is concerned, it can well

be assessed. The income can well be assessed at Rs.1,000/-. It is true that the doctor has assessed his functional disability at 100%. It is not possible to imagine that for rest of the life, the appellant would depend on the others, himself doing nothing. When his upper limbs are in a position to function properly, there is every likelihood that he would generate some income to maintain himself. Therefore, his monthly loss can be assessed at Rs.400/-, which would bring the actual loss of Rs.4800/-. Considering the age of the boy, multiplier of 15 can easily be applied. The Tribunal has not granted any amount under this head. Therefore, it is now required to be granted to the appellant. The Tribunal has granted only Rs.10,000/- for medical treatment. I do not propose to add anything to the same. Thus, the appellant would be entitled to the additional sum of Rs.95,750/- (Rs.4850 x 15=72750 + 25,000/-=Rs.97,750- Rs.2,000/- = Rs.95,750/-)by way of compensation.

So far as the finding given by the Tribunal exonerating the Insurance Company is concerned, I am not at all in agreement with the said fact. It was when the dispute was raised by the Insurance Company, that all necessary efforts were made by the appellant for getting the policy produced on record. The Tribunal ought to have called upon the Insurance Company or the owner or the concerned authority to produce the said policy on record. For that purpose, the Tribunal has been conferred with the necessary powers under the Act and the Rules. It has completely failed to do so. The appellant cannot be

penalised for the same. In view of the same, this finding is required to be quashed and set aside and it is presumed that when the Insurance Company has failed to establish the facts that the offending vehicle was insured with it and it was liable to cover any liability arising in respect of the owner.

6. It is the case of the appellant that he was traveling as cleaner in discharge of his duty. The vehicle was also driven by respondent No.1, who was employee of respondent No.2. Therefore, for the negligent act of respondent No.1, respondent No.2 vicariously liable. However, under the Act, unless there is contract between the insured and the Insurance Company covering wider liability, liability is only to the extent as provided under the Workmen's Compensation Act. As per the calculation made by the learned counsel for the parties, it comes to Rs.85,702.50 ps. Therefore, the award is required to be restricted to the said amount. From this amount, Rs.13,000/-, which is already awarded by the Tribunal, is required to be deducted. Hence, respondent Nos. 2 and 3 are jointly and severally liable to pay the balance amount to the appellant. Hence, the appellant is entitled to the said amount with interest at the rate of 12% p.a. from the date of the petition till realisation with proportionate costs.

7. After the dictation of the judgment is over, Mr. Sandeep Shah, learned advocate for the Insurance Company, has appeared and has submitted that there is no policy on record and has also submitted that

the finding is just and proper. However, I have recorded my findings above and, in view of the same, it is not possible to accept the submissions of Mr. Sandeep Shah.

8. In view of the above, the appeal is allowed.

Sd/-

(AKSHAY H.MEHTA, J.)

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